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In the Supreme Court of the United States

OCTOBER TERM, 1994

LAKEWOOD ENGINEERING & MFG. CO., INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

DREW S. DAYS, III
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 514-2217

FREDERICK L. FEINSTEIN
General Counsel

LINDA SHER
Acting Associate General Counsel

NORTON J. COME
Deputy Associate General Counsel

JOHN EMAD ARBAB
Attorney
National Labor Relations Board
Washington, D.C. 20570

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QUESTION PRESENTED

Whether the National Labor Relations Board reasonably concluded that the conduct of union representatives in photographing union supporters participating in union rallies on the day of a Board-supervised election, and in photographing two employees who were observing one of the rallies, did not, under the circumstances of this case, tend to interfere with the employees' free and uncoerced choice in the election.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-40a) is unpublished, but the decision is noted at 28 F.3d 1216 (Table). The decision and order of the National Labor Relations Board (Pet. App. 41a-56a) is unreported, but the decision is noted at 143 L.R.R.M. (BNA) 1191. The underlying decision and certification of representative (Pet. App. 57a-150a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 23, 1994. The petition for a writ of certiorari was

filed on September 21, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner is engaged in the production of portable electric fans, heaters and chair swivels at several locations in Chicago, Illinois. Pet. App. 45a. On February 4, 1992, the Union[1] filed a petition with the regional office of the National Labor Relations Board (Board) for an election in a unit of petitioner's approximately 540 full-time production, maintenance, tool room, and warehouse employees. Petitioner and the Union thereafter entered into a stipulation, approved by the Board's Regional Director, to hold an election in the unit on April 3, 1992. *Id.* at 62a-64a. The election was conducted on that date at four of petitioner's locations, including its Sacramento Boulevard facility, where the polls were open from 6:30 a.m. to 8:00 a.m. and from 3:00 p.m. to 5:00 p.m., and its Carroll Street facility where the polls were open from 6:30 a.m. to 7:30 a.m. and from 10:30 p.m. to 11:30 p.m. *Id.* at 66a.

Beginning about 5:30 a.m. on election day, eight to 12 pro-Union employees and Union representatives gathered on the sidewalk adjacent to the driveway at the Sacramento Boulevard facility, where they waved Union banners and urged employees to vote for the Union. Pet. App. 8a-9a. Rico Cristo, a Union representative, took photographs of this group of Union supporters; he did not, however, photograph employees entering the driveway or anyone other than those Union supporters. *Id.* at 112a.

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[1] Warehouse, Mail Order, Office, Technical and Professional Employees Union, Local 743, a/w International Brotherhood of Teamsters, AFL-CIO.

At the Carroll Street facility, a group of approximately 20 pro-Union employees and Union representatives gathered across the street from the entrance to the plant from about 9:45 p.m. until the polls closed at 11:30 p.m. At this rally, a pro-Union employee used a megaphone to ask the group how they had voted, to which the group responded "Teamsters"; music was also played on a car radio. Pet. App. 5a, 89a, 97a. The event, however, was not held to urge employees to vote for the Union, but was instead in the nature of a pep rally for Union supporters prior to the ballot count. *Id.* at 5a. Jose Galvan, a Union representative present at the rally, took photographs of Union supporters, which later appeared in a Union publication. *Id.* at 117a. Galvan also took one photograph of two other employees not involved in the rally, who were watching the rally from an unlit tool room at the Carroll Street facility. *Id.* at 93a-94a, 116a-117a.

2. The Union won the election by a vote of 312 to 197, with 37 challenged ballots. Pet. App. 3a. Petitioner filed objections to the election, including an allegation that, in photographing employees as described above, the Union had destroyed the atmosphere necessary for a free and fair election. *Id.* at 27a, 114a-115a.

After an evidentiary hearing, the Board's hearing officer recommended that the Board overrule petitioner's objection and certify the Union as the employees' collective bargaining representative. Pet. App. 148a-149a. The hearing officer explained that the Union's photography did not constitute objectionable conduct because (with the exception of the single photo of the two employees in the unlit tool room) the Union photographed only Union supporters participating in pro-Union rallies and, further, because the photographs had

been taken for use in a Union publication. *Id.* at 116a-118a.

The Board adopted the hearing officer's recommendation and certified the Union as the employees' collective bargaining representative. Pet. App. 57a-61a. Citing its decision in *Nu Skin Int'l, Inc.*, 307 N.L.R.B. 223 (1992), the Board concluded that "the photos taken of employees voluntarily attending a Union rally are not objectionable," particularly in light of the Union's legitimate, noncoercive explanation for taking the photographs. Pet. App. 59a n.1. The Board added that "the single photo taken of two employees observing the rally from the darkened toolroom was an isolated event that does not warrant setting aside the election." *Ibid.*[2]

When petitioner subsequently refused to bargain, the Union filed an unfair labor practice charge. The Board's General Counsel issued a complaint and moved for summary judgment on the ground that all issues relevant to the unfair labor practice charge were, or could have been, litigated in the representation proceeding. The Board granted summary judgment, finding that petitioner had violated Section 8(a)(5) and (1) of the National Labor Relations Act (Act), 29 U.S.C. 158(a)(5) and (1), and ordered petitioner to bargain with the Union. Pet. App. 12a-13a, 41a-56a.

3. The court of appeals enforced the Board's order in an unpublished opinion. Pet. App. 1a-40a. The court

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[2] The Board also overruled petitioner's objection that the Union supporters and representatives who conducted the rallies at the Sacramento Boulevard and Carroll Street polling sites had threatened and intimidated employees. Pet. App. 57a-61a, 119a-122a. The court of appeals affirmed the Board's determination, *id.* at 17a-27a, and petitioner does not challenge that aspect of the court's decision here.

affirmed the hearing officer's finding that, except for the two employees in the darkened toolroom, "the subjects of the [Union's] photographs were all Union supporters attending a rally." *Id.* at 35a-36a. Although the court found it "troubling" that the Union had not "offer[ed] an explanation for the photography at the time the pictures were being snapped," the court noted that the Union had offered a legitimate explanation for the photography at the hearing. *Id.* at 37a. The court agreed with the Board that it would be inappropriate to set aside the election, for the Union's photography had not intimidated, coerced, or influenced the employees' exercise of free choice at the polls. *Id.* at 38a.

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. Further review is therefore not warranted.

1. Petitioner suggests (Pet. 13-26) that the Board should have set aside the election because the Union did not give the pro-Union employees whom it photographed at the Union rallies a contemporaneous explanation as to why it was photographing them. There is no merit to that contention.

Where parties to Board elections are alleged to have engaged in misconduct, the Board will set aside the election if, under the circumstances presented, that "conduct reasonably tends to interfere with the employees' free and uncoerced choice." *Pepsi-Cola Bottling Co.*, 289 N.L.R.B. 736, 736 (1988). Accord *Sunbelt Mfg.*, 308 N.L.R.B. 780, 780 n.3 (1992), enforced mem., 996 F.2d 305 (5th Cir. 1993). As the Board explained in *Nu Skin Int'l, Inc.*, 307 N.L.R.B. 223, 224 (1992), a union's photographing of employees who

voluntarily attend a union-sponsored function (there, a picnic luncheon) does not tend to interfere with employee free choice, since no reasonable employee so photographed would conclude that the union had taken the photographs for the purpose of future retaliation. Photographs of willing participants in union activity, the Board explained, are distinguishable from photographs taken of employees whose union sentiments may be unknown or who oppose the union, for such photographs readily suggest a retaliatory purpose. *Ibid.* (discussing *Pepsi-Cola Bottling Co.*, *supra*, and *Mike Yurosek & Son, Inc.*, 292 N.L.R.B. 1074 (1989)). Applying the analysis set forth in *Nu Skin Int'l*, the Board reasonably concluded that in this case the Union's photographing of pro-Union supporters participating in Union rallies was not objectionable conduct. Pet. App. 58a n.1, 38a.[3]

Contrary to petitioner's submission (Pet. 17-19), the Union's photographing of its supporters at the rallies was not objectionable simply because the Union did not give those employees a contemporaneous explanation for

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[3] Petitioner asserts (Pet. 14) that the Board and the court of appeals overlooked "undisputed evidence that one of the union organizers took pictures of employees at the Sacramento Boulevard plant as they came to work." See also Pet. 17, 22-23. Petitioner's argument is premised on a mischaracterization of the record. As the Board's hearing officer found (Pet. App. 112a), "there was no evidence that [Union representative] Cristo took photographs of employees entering the driveway or anyone other than the [Union's] supporters" at the Sacramento Boulevard plant. The excerpts from Cristo's testimony referenced by petitioner (see Pet. 14 & n.3) are consistent with the hearing officer's finding. In any event, whether this record provides substantial support for the hearing officer's conclusion that the Union photographed only pro-Union employees who were participating in the Union's rally is a fact-bound question that does not warrant review by this Court. *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 490-491 (1951).

its action. Photographs by a union of pro-union employees are not coercive regardless of whether the union has offered the employees a reason for taking them. See *Nu Skin Int'l*, 307 N.L.R.B. at 224-225. Moreover, even where the conduct at issue is less innocuous, the Board will consider explanations tendered by the union at the Board hearing in determining whether, under all of the circumstances, the conduct tended to interfere with employee free choice. See *Mike Yurosek & Son, Inc.*, 292 N.L.R.B. at 1074 (Board considered union's explanation at hearing for photographing anti-union campaign activity but rejected it as not credible); *Pepsi-Cola Bottling Co.*, 289 N.L.R.B. at 736-737 (Board noted that union had offered no explanation at hearing for videotaping employees as they were being offered union leaflets).

2. Petitioner also contends (Pet. 20-22) that the Board should have set aside the election on the basis of the Union's single photograph of the two employees who were observing the Carroll Street rally from the darkened tool room. According to petitioner, the Board's conclusion that the single photograph amounted to an isolated incident that did not warrant setting aside the election, is inconsistent with the principle that "to evaluate properly the probable effect of conduct which is coercive in nature, * * * the number of employees directly involved cannot * * * serve as [a] determinative factor." Pet. 21, quoting *Intercontinental Mfg.*, 167 N.L.R.B. 769, 770 (1967). Contrary to petitioner's suggestion, there is no conflict between the Board's decision in this case and its holding in *Intercontinental Mfg.*

In *Intercontinental Mfg.*, the Board found that the employer's conduct during the election campaign was

coercive. 167 N.L.R.B. at 770.[4] Upon that finding, the Board rejected the hearing officer's conclusion that the employer's conduct did not warrant setting aside the election because it had affected only six of over 700 employees eligible to vote. Here, by contrast, the Board concluded that in the circumstances of this case the photographing of the two employees in the darkened Carroll Street tool room was not objectionable conduct. Pet. App. 38a, 58a-59a n.1.[5] That conclusion is amply supported by the evidentiary record.

First, since these two employees had already voted earlier in the day (see Gov't C.A. Br. 16-17), their electoral choice could not possibly have been influenced by the Union's subsequent photographing of them, which occurred sometime between 9:45 and 11:30 that evening. Pet. App. 66a, 89a. Second, the record does not establish that either employee told any co-worker who had not yet voted that the Union had taken his picture. Third, the record does not show that any employee who voted at the Carroll Street polling site observed the Union representative in the act of photographing the two employees.[6] On these facts, the Board was justified in

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[4] In *Intercontinental Mfg.*, shortly before the election, company officials, among other things, told an employee that, if the union won, the company would no longer be able to release him from his normal duties to permit him to make deliveries, and told two employees that the company considered them "enemies" so long as they wore union insignia. 167 N.L.R.B. at 769-770.

[5] While petitioner suggests (Pet. 23-25) that the Board "reli[ed] on the Union's victory margin to somehow excuse the Union's misconduct," that allegation finds no support in the record.

[6] Indeed, it appears quite unlikely that any voter could have witnessed the challenged conduct. The Union conducted its rally across the street from the front entrance to the Carroll Street plant, an entrance used by only one employee during the evening

not setting aside the election based on the single photograph taken of the two employees in the darkened tool room.

3. Finally, petitioner contends (Pet. 27-40) that the court of appeals' decision conflicts with that court's own precedents, and with those of the Board, in that the court held that petitioner must produce "subjective evidence that the [Union's] picture-taking was intimidating in fact" (Pet. 27-28) in order to set aside the election. As an initial matter, any conflict between the decision in this case and other decisions of the Seventh Circuit is a matter for that court to resolve. See *Wisniewski* v. *United States*, 353 U.S. 901, 901-902 (1957). On the merits, petitioner's argument cannot withstand scrutiny, because it mischaracterizes the context and significance of the quoted language.

The court of appeals did not reject petitioner's challenge to the election for lack of evidence of the employees' subjective reactions to the Union's photography. Rather, the court agreed with the Board that the photography in this case did not justify setting aside the election, in light of the hearing officer's findings that virtually all of the photographs were of Union supporters and that the pictures had been taken for publication in the Union's newsletter. Pet. App. 34a-38a. While the court did note (*id.* at 36a) that petitioner had not produced "any eyewitnesses to testify that he or she was concerned or made to feel uncomfortable by the Union's picture-taking," that reference does not reflect,

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voting session, as the rest of the employees entered through back or side entrances where no Union supporters or representatives were present. Pet App. 94a, 119a. Moreover, the conduct in question was both brief and unannounced—"Galvan turned quickly and took a picture" (*id.* at 93a).

as petitioner suggests (Pet. 27-28), that the court viewed such evidence as necessary for a finding of coercion. The court's remark was made in the context of comparing the facts of this case with those in *Nu Skin Int'l*, where the Board found challenged photography not coercive despite the testimony of two employees that they were "concerned" and "felt funny" about being photographed. See Pet. App. 36a (quoting *Nu Skin Int'l*, 307 N.L.R.B. at 224).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

FREDERICK L. FEINSTEIN
General Counsel

LINDA SHER
Acting Associate General Counsel

NORTON J. COME
Deputy Associate General Counsel

JOHN EMAD ARBAB
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